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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 249

HAROLD C. FULLER, *Petitioner,*

v.

STATE OF ALASKA, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

PETITION FOR REHEARING

THOMAS E. CURRAN, JR.
825 West 8th Avenue
Anchorage, Alaska 99501

GEORGE KAUFMANN
1815 H Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioner

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On October 28, 1968, this Court granted the Petition for a writ of certiorari and summarily affirmed the judgment of the Supreme Court of Alaska in this case. The Court agreed with petitioner that "the decision of the Alaska Supreme Court cannot stand * * * if *Lee* [*v. Florida*, 392 U.S. 378] is to be applied retroactively," because *Lee* had overruled *Schwartz v. Texas*, 344 U.S. 199, on which the judgment affirming petitioner's conviction was based. But the Court held that *Lee* was not to be applied retroactively, even in this direct review proceeding, and affirmed the judgment on that basis. We submit that the propositions decided by this Court are of such complexity and importance that summary disposition was unwarranted.

1. That the questions decided in the October 28 opinion merit plenary consideration appears from two cases in which certiorari has already been granted, *Kaiser v. New York*, No. 62, this Term and *Desist v. United States*, No. 12, this Term. The retroactivity of Lee is discussed at considerable length by the parties in *Kaiser*. See Brief for Petitioner, pp. 52-58 and Brief for Respondent, pp. 80-91. A subject which counsel on both sides regard as worthy of such presentation can hardly be covered adequately in a Reply to an Opposition to a Petition for Certiorari, yet it was the Opposition which first brought the issue into this case.[1] *Kaiser* also presents the closely related questions of the retroactivity of *Berger v. New York*, 388 U.S. 41 and *Katz v. United States*, 389 U.S. 347. The retroactivity of *Katz* is also a major issue in *Desist v. United States, supra*. In *Desist*, petitioner filed a supplemental reply brief, whose main objective was to escape the impact of the Court's opinion herein, and the government in turn relied heavily on this case in oral argument.[2] It reverses the normal process of adjudication to formulate rules of decision by summary disposition and then to follow these in

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[1] Theoretically, the retroactivity of *Lee* could have been discussed in the Petition for Certiorari. But we regard it as the function of such a Petition to concentrate upon the issues decided by the Court whose judgment is sought to be reviewed, rather than to anticipate new grounds for affirmance that a respondent may advance, and to suggest that these present further grounds for granting certiorari.

[2] Petitioner's Supplemental Reply Brief in *Desist* purports to describe telephone conversations with Washington counsel in the present case, and predicates thereon the argument that it can be limited to its own facts. Since it is clear from the Court's opinion herein that it did not undertake to decide for itself whether there was an underlying violation of Section 605 of the Communications Act, and since, as we explained in prior submissions, that is a question that should initially be decided by the Alaska Supreme Court, we deem it sufficient to state, without further burdening the Court with non-record matters, that the *Desist* brief does not describe these conversations accurately or completely.

cases which are given plenary consideration. The very purpose of the rules providing for briefs on the merits and oral argument is to give this Court the opportunity to decide important questions on the basis of fully developed presentation of the issues. Submissions on a Petition for Certiorari cannot perform this function – and indeed may be a disservice to the Court if they are too elaborate.

2. In our discussion of the retroactivity issue in our reply memorandum we urged, on the basis of our reading of *Lee*, that after *Mapp v. Ohio*, 367 U.S. 643, "the states could no longer rely on the continuing validity of *Schwartz* in obtaining or introducing evidence in criminal prosecutions." That contention has now been rejected. We would not petition for rehearing simply to request a reconsideration of the conclusion that *Mapp* did not strip *Schwartz* of all vitality as a precedent; but this Court's reasoning in *Lee* clearly implied that the overruling of *Schwartz* was compelled by prior precedent, and in *Johnson v. New Jersey*, 384 U.S. 719, 731, the Court spoke of the application of retroactivity to achieve "the justifiable effect of curing errors committed in disregard of constitutional rulings already clearly foreshadowed." Thus, accepting that *Schwartz* did retain validity after *Mapp*, it does not automatically follow that *Lee* is properly denied retroactivity. For *Johnson* creates an added dimension to the "reliance" issue – a dimension that could not be developed within the confines of a reply to a brief in opposition.

In *Johnson* the Court said: "As for the standards laid down one week ago in *Miranda v. Arizona*, 384 U.S. 536, if we were persuaded that they had been fully anticipated by the holding in *Escobedo v. Illinois*, 378 U.S. 478, we would measure their prospectivity from the same date. Defendants

still to be tried at that time would be entitled to strict observance of constitutional doctrines already clearly foreshadowed." 384 U.S. at 734.[3] The Court decided, however, that *Miranda* laid down "additional guidelines to situations not presented by" *Escobedo*, and that these guidelines would be available only to persons whose trials had not begun as of the date *Miranda* was decided. *Johnson* is the only case which even touches on the effect to be given a decision of this Court which builds upon a prior change in doctrines. Yet that problem will recur continually with respect to refinements and extensions of the important decisions of this Court.[4]

Mathis v. United States, 391 U.S. 1, may serve as an example. *Mathis* followed *Miranda*, but on different facts; some members of the court believed that it expanded the principle of that decision. If a lower court is faced with a case identical with *Mathis*, the trial of which began between June 13, 1966, the date *Miranda* was decided, and May 6, 1968, the date *Mathis* was decided, should it give effect to *Mathis*?

3. The Court decided, without elaboration, "that the *Lee* rule is to be applied only to trials in which the evidence is sought to be introduced after the date of the decision in *Lee*." Consequently, the present petitioner was denied benefits of *Lee* although his case came here on direct review. A similar approach was followed in *Johnson v. New Jersey, supra; Stovall v. Denno, supra;* and *DeStefano v. Woods*, 392 U.S. 631, 635. On the other hand, *Linkletter v. Walker*, 381 U.S. 619 and *Tehan v. Shott*, 382 U.S. 406, distinguished

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[3] The court earlier referred to the "justifiable effect of curing errors committed in disregard of constitutional rulings already clearly foreshadowed." *id* at 731.

[4] As *Stovall v. Denno*, 388 U.S. 293 illustrates, the retroactivity problem is not limited to decisions which in terms overrule prior precedents.

between cases which were pending on direct review and those in which the new doctrine was sought to be applied in cases where the conviction had already become final. While *Johnson, Stovall* and *DeStefano* all recognized that their approach differed from that taken in *Linkletter* and *Griffin*, they did not expressly overrule those decisions, and we do not believe (despite the Government's oral argument in *Desist, supra*) that this Court's opinions can properly be interpreted to have abandoned the distinction. Rather they apply retroactivity on a case-by-case basis with special attention to the nature of the rule and the practical consequences of retroactivity. Thus, there are variants regarding the cut-off date even among the decisions which denied retroactivity to defendants whose cases were pending on appeal when the new rule was announced.

We submit that where retroactivity is to be limited, the distinction between cases which are pending on direct review and those where the new principle is sought to be raised in post-conviction proceedings will often be the most satisfactory. For that distinction rests on the concept of finality which is one of the "considerations of convenience, of utility, and of the deepest sentiments of justice" which must be the ultimate guide, cf. Cardozo, *The Nature of Judicial Process*, Lecture IV. To be sure, finality in criminal prosecutions has lost some of its significance since *Fay v. Noia*, 372 U.S. 391; but that case is hardly authority for the proposition that it is just to treat differently two defendants who are similarly situated, except that the case of one rather than the other has become the vehicle for the overruling of an earlier decision, which both had challenged at every available opportunity. Compare 372 U.S. at 441. This is not to suggest that *Stovall* and *Johnson* were wrongly decided; but it is to urge that only the severest practical exigencies can justify denying effect to a decision of this Court in other cases which have raised the same question before a conviction has become final. Since violations of §605 by law enforcement officials were not as prevalent as,

for example, interrogations which did not anticipate *Miranda*, no such drastic limitation of *Lee* is required. Moreover, unless *Linkletter* has been overruled *sub silentio*, its approach should govern here, for *Lee* is more analogous to *Mapp* than to any other overruling decision.

4. In the final analysis, the retroactivity problem is one of the effect to be given to the constitutional precedents of this Court. When this Court holds that a new constitutional principle is not to be followed by lower courts with respect to some cases in which that rule is invoked, it establishes an exception to the general requirement of obedience to its precedents. That principle is not an absolute, and may be overridden by considerations of greater force; and we do not challenge the judgment that these were present in each of the cases which have limited retroactivity. But the instances in which full effect is not given to this Court's precedents should be rare and clearly defined; otherwise the lower courts will be called upon to inquire on every occasion on which they are confronted with a claim under a new rule whether that rule or the old one is to govern the disposition of the case before them. Unless the lower courts are to be encouraged to experiment with avoidance of this Court's precedents, the circumstances on which they are not binding should be few, and clearly articulated. Such guidance should be given promptly. For the reasons stated earlier in the brief, we submit that this case is an appropriate vehicle for this purpose, and that rehearing should be granted. Failing that, we urge that the Court address itself fully to these questions in the pending

cases in which certiorari has already been granted (*Desist* and *Kaiser, supra*) and that this Petition be held in abeyance pending disposition of these cases.

Respectfully submitted,

THOMAS E. CURRAN, JR.
825 West 8th Avenue
Anchorage, Alaska 99501

GEORGE KAUFMANN
1815 H Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioner